The Uniform Environmental Covenant Act: Issues for states

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UECA Overview

- Creates an effective mechanism that overcomes legal limitations of other IC tools (zoning, common law easements, etc.)
  - Many states lack effective mechanisms, so should consider adopting UECA or similar
- Acknowledges “institutional” limitations of IC’s
- Contains many imbedded policy choices
  - Some choices may not be desirable for all states
  - “Second-tier” issues (i.e., unrelated to legal enforceability of covenant); nonetheless important

UECA compared to Colorado IC law

- Colorado statute
  - state approves all covenants
  - no “holder”
  - not an interest in property
- UECA
  - Environmental cleanup decision-maker approves covenant
    - could be DOE, DOD, EPA or state
  - must have a “holder”
    - can be any entity
  - holder’s interest is property interest

UECA compared to Colorado IC law, cont'd.

- Colorado law
  - consent of original grantor not required to modify covenant
  - not defeated by exercise of eminent domain
  - covenant ***required*** for cleanups using engineered controls or "risk-based" approach
- UECA
  - original grantor must approve modifications unless right waived
  - Eminent domain may defeat covenant; requires court proceeding
  - no trigger

UECA vs. Colorado law, cont'd.

- Colorado law
  - enforcement through administrative or judicial means
  - Part of state's hazardous waste (RCRA) statute
  - Priority of covenant not explicitly addressed
- UECA
  - Judicial enforcement only
  - May be codified separately from state's RCRA statute
  - Prior interests take priority over covenant unless subordinated

UECA policy issues

- Will not simplify creation of IC's at federal facilities
  - DOD and others argue states can't make them grant a property interest
  - Relationship to RCRA, CERCLA waivers?
- Diminished state authority over creation of covenants
  - State has no approval role at federal facilities or NPL fund-lead sites
    - Federal agencies have demonstrated desire to defer creating covenants, will impair remedy protectiveness
    - At Fund-lead sites, how can state meet NCP requirement to assure IC's are "in place, reliable, and will remain in place" if state has no role in IC?
- Impact on IC "institution"?
  - Multiple agencies responsible for covenant oversight

UECA policy issues

- Impacts on “Brownfields re-development?
- NCCUSL: Grantor veto necessary to “un-mothball” old facilities
    - Original PRP retains some residual liability at site
- But, grantor veto may inhibit subsequent re-development of remediated properties
  - Grantor’s (often the polluter) veto authority over modifications creates “property right in pollution”
    - Contrast common law: no property right in maintaining a nuisance
    - Makes modifications more cumbersome
    - Original polluter may extract financial windfall for allowing others to remediate his contamination
- Balance of interests may vary from state to state

UECA policy issues

- Agency resource drain
  - No administrative enforcement; agency must go to court to enforce violations of covenant
  - Judicial proceeding required for modification or termination; agency required to appear in eminent domain proceedings affecting covenant

UECA policy issues

- Limitations on covenant
  - Eminent domain
  - Prior interests
    - Subdivision covenants
- Lack of “trigger” weakens implementation
  - EPA NPL data
  - If no trigger, is covenant an ARAR?
  - If no trigger, is covenant a “requirement” under sovereign immunity waivers?

Summary

- UECA creates an effective IC mechanism
  - States without effective IC statute should adopt UECA or similar legislation
- Raises several policy issues on which states may have differing views
  - Most issues could be addressed through minor revisions to UECA without significant impacts on “uniformity” (IMHO)